

BOARD OF APPEALS CASE NO. 5315

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BEFORE THE

APPLICANT: Randall & Michelle Harris

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ZONING HEARING EXAMINER

**REQUEST: Special Exceptions to allow
construction services and suppliers use and
commercial vehicle storage in the AG District;
3324 N. Furnace Road, Jarrettsville**

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 3/26/03 & 4/2/03

HEARING DATE: May 19 and August 13, 2003

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Record: 3/28/03 & 4/4/03

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ZONING HEARING EXAMINER'S DECISION

The Applicants, Randall and Michelle Harris, are requesting a special exception, pursuant to Section 267-53D(1), of the Harford County Code, to allow commercial vehicle storage, and a special exception pursuant to Section 267-53H(1), to allow construction services and suppliers in an AG District.

The subject parcel is located at 3324 North Furnace Road and is more particularly identified as "Land of Bennett" on Tax Map 31, Grid 3F, Parcel 202, Lot 2-A. The parcel consists of 7.775 acres, is zoned AG, Agricultural, and is entirely within the Fourth Election District.

Mr. Jeffrey Deegan appeared and qualified as an expert in site plan design and engineering. Referring to the Site Plan marked as Exhibit 6, the witness pointed out the property boundaries, improvements on the property and located adjoining uses. The parcel is nearly 8 acres in size and is 75% wooded with mature forest cover. Trees are 80-120 feet in height and are deciduous varieties for the most part. The existing house is 750 feet off of North Furnace Road and a pole barn has been constructed next to the house. The pole barn is 40 feet by 60 feet in dimensions and is 17 feet in height. The closest adjoining properties are 450 and 750 feet away from the pole barn and proposed storage area respectively.

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The witness located, on the Site Plan, existing wetland and buffer areas and the proposed location of additional plantings to the southeast and northwest of the existing pole barn that will provide additional screening of the storage area during winter months. The pole barn was constructed on a mound of fill dirt and is approximately 6 feet above natural grade as a result. The proposed parking area is 4800 square feet and no storm water management area is required.

Michelle Harris appeared and testified that she and her husband operate the Harris Concrete Company. Besides her husband she is the only office employee. There are no business signs on the property. The pole barn was constructed to house equipment and supplies used in the business as well as provide storage for some personal items. Equipment stored on the property includes a skid loader, Dodge 1-ton truck, Chevy pickup, personal Camaro automobile, air compressor, patio furniture, trailer for bobcat.

Mr. Randall Harris appeared and testified that he and his wife operate the business. He has been in the business for 18 years which he described as decorative concrete installation. Mr. Harris is seeking approval to store the Dodge 1-ton and trailer with Bobcat outside. While he admitted these could be stored inside the building he stated that it is quicker, less noisy, and more efficient to hook up outside when leaving for a job site. In describing the operations that take place on the property, Harris stated that dye is used to provide color to the concrete and these dyes are stored inside the pole building. No concrete is mixed on the parcel. Generally work is conducted 6:00 a.m. to 6:00 p.m. 5-6 days per week Sometimes hours are longer depending on workload. Other than he and his wife, there are 4 other employees. These four employees generally do not come to the subject parcel and do not park there. There are times they come to load material or equipment. The witness admitted that he did not obtain permits for the pole barn as he thought barns could be constructed on AG zoned property without permits.

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Ms. Aimee O'Neill appeared and qualified as an expert real estate appraiser. Ms. O'Neill described the parcel and the surrounding uses in the vicinity of the Applicant's property. The area is largely farming uses with a mix of residential uses. There are similar uses as that proposed by the Applicants in the area. Based on a study of paired comparisons, Ms. O'Neill expressed her professional opinion that uses such as those proposed by the Applicant are compatible with other uses generally found in the AG zone, have no negative impact on area property values and generally have no adverse impacts associated with them different than or greater than other similar uses commonly found in the AG zone.

Mr. Lee Cunningham appeared and qualified as an expert land use and transportation planner. Mr. Cunningham described the area and located natural features on the site plan. Uses were described as predominantly farm uses with mixed residential and commercial uses in the neighborhood. In his opinion, such uses are compatible with other farm uses and actually have less impact than constant farm use of farm equipment. The pole barn is similar to other structures in the immediate area. North Furnace Road is a 25 foot roadbed and, at the Applicant's driveway the road is fairly straight with 200-250 feet sight distance in either direction. The posted speed is 25 mph and it is a typical Harford County rural road. The trucks and equipment used by this Applicant, according to Cunningham, are smaller than those employed by other special exception uses with which he is familiar. In his opinion, the use proposed by the Applicant will not result in adverse impacts dissimilar from other farm uses or similar special exception uses found in the AG District.

Mr. Bruce MacIntire appeared and testified that he lives at 3328 North Furnace Road, just north of the subject parcel. He stated that he is familiar with the Applicants' operations and that he has no objections. For the most part, the existing trees, according to the witness, obscure all view of the storage area and uses.

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Mr. Anthony McClune appeared on behalf of the Department of Planning and Zoning. The Department has recommended approval of the request finding that the Applicants can meet or exceed all Code requirements for their proposed special exception uses without any adverse impacts above and beyond those normally associated with such uses regardless of where they are located within the AG District. McClune did point out, however, that if the building were for personal use storage, the size exceeds Code threshold and a variance would be needed to accommodate size and height. In making its findings and recommendations, the Department assumed that all business items would be stored entirely within the building. If storage is proposed outside, there is no need for the building.

A number of persons appeared in opposition to the request. Mrs. Anne DeCoursey lives at 3319 North Furnace Road and is familiar with the subject parcel and the uses of the parcel by the Applicants. Mrs. DeCoursey had a number of objections including the sound and smell of diesel trucks (which she guessed were used by the Applicant); the lights on the building that are on all day and night; the view of the pole barn and equipment which she stated are not obscured by existing foliage and will not be screened by proposed additional plantings of Leland Cypress trees as described by the Applicants' witnesses. Most importantly, the witness felt that this was a commercial use and one not compatible with other agricultural uses.

Mr. Joseph Carlozo appeared and testified that he lives at 2216 North Furnace Road. While the witness stated that he lives one-half mile away and cannot see the Harris property or operations, he is nonetheless concerned about the impact of the Applicant's special exception uses on the community. The witness described the area as residential.

Mr. Ray Tamberino lives at 3316 North Furnace Road, adjacent to the subject parcel. His house is 400 feet from the Harris house. Mr. Tamberino has a full view of the operations on the Harris property. Despite heavy forestation, the trees are leafless a good part of the year. He objects to the nighttime lights and does not feel that Leland Cypress will totally screen the uses from view. The witness objected most because the pole barn was erected without a permit and ignored neighborhood concerns about the building and the proposed uses on the parcel. Many trees have been clear cut on the Harris property, according to the witness. He has observed open burning in the past as well as storage of piles of crusher run in the Harris driveway. He finds the use and the storage visually objectionable.

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Essentially, the witness thinks the operation noisy, smelly and ugly and he wants the original beauty of the parcel restored. He expressed fears that his property value will decline as a result of activities on the Harris property. On cross-examination, the witness admitted that, other than the trucks leaving in the morning and returning in the evening, there is no other noise or odor associated with the activities on the Harris property.

As a rebuttal witness, Applicant called Mr. Stanley Kollar, Jr. who qualified as an expert landscaper and nurseryman Mr. Kollar described the evergreen plantings that he would propose to screen the pole building and parking area. The proposal is to place 18 conifer and evergreen trees around the pole building and garage parking area to block lines of sight from the adjoining residences. In his opinion, these plantings, coupled with existing canopy cover, will provide complete screening of the uses proposed by the Applicants.

CONCLUSION

The Applicants, Randall and Michelle Harris, are requesting a special exception, pursuant to Section 267-53D(1), of the Harford County Code to allow commercial vehicle storage, and a special exception, pursuant to Section 267-53H(1), to allow construction services and suppliers in an AG District.

The provisions of the Harford County Code applicable to this request are:

Section 267-51 Purpose.

“Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.

Section 267-52

- A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.

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- C. Extension of any use or activity permitted as a special exception shall require further Board approval.**
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.**
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.**

Section 267-53D(1)

Motor vehicle and related services.

- (1) Commercial vehicle and equipment storage and farm vehicle and equipment sales and service. These uses may be granted in the AG District, and commercial vehicle and equipment storage may be granted in the VB District, provided that:**
 - (a) The vehicles and equipment are stored entirely within an enclosed building or are fully screened from view of adjacent residential lots and public roads.**
 - (b) The sales and service of construction and industrial equipment may be permitted as an accessory use incidental to the sales and service of farm vehicles and equipment.**
 - (c) A minimum parcel area of two (2) acres shall be provided.**

Section 267-53H(1)

“Construction services and suppliers. These uses may be granted in the AG and VB Districts, provided that a buffer yard ten (10) feet wide shall be provided around all outside storage and parking areas when adjacent to a residential lot or visible from a public road.”

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The Hearing Examiner finds that the statutory requirements in this case for a grant of the requested special exception have been met or exceeded. The parcel is zoned AG and consists of eight acres (2 acre minimum required). The equipment can be stored in a manner that completely screens them from the view of adjacent residential lots. The pole building is not visible from the road (sits in excess of 750 off of North Furnace Road with heavy forestation).

In evaluating any special exception use, in addition to the statutory requirements that must be met, the Hearing Examiner must evaluate the request in light of the “Limitations Guides and Standards” set forth in Section 267-9I of the Harford County Code.

“Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:

- (1) The number of persons living or working in the immediate area.

This area of the County is a mix of uses including primarily farming and agricultural uses with mixed residential uses.

- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to road; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.

North Furnace Road is a typical rural road and there is adequate sight distance from the access point of Applicants’ property (200-250 feet in a posted 25 mph zone). The only trips generated by vehicular traffic are out in the morning with return at night resulting in negligible impact to traffic conditions.

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- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.

The proposal is a use that is permitted by way of special exception in the Agricultural District with Board approval. The use should not adversely impact the neighborhood. There is no reason to believe that should the use be approved, the proposal will have any adverse fiscal impacts on the County.

- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.

The proposed use is a decorative concrete finishing and installation business which do not, according to any of the witnesses have associated impacts related to odors, dust, gas, smoke, fumes, vibration, glare or noise upon the use of surrounding properties. There was testimony that a diesel engine was noisy and that diesel fuel had an odor, but use of diesel fuel is not uncommon in the AG District considering the variety of farm equipment that uses diesel engines. While the Hearing Examiner agrees that diesel fuel has a distinct smell and that diesel engines have a distinct sound, neither the smell nor the sound is unusual or out of the ordinary in an AG zone.

- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the County or persons to supply such services.

Police protection will be provided by the County's local Sheriffs Department and the Maryland State Police. Fire protection will primarily be from the local Voluntary Fire Departments. The parcel has its own well and septic and the operation as described will not adversely impact either of those facilities. Trash collection will be handled by a private hauler.

- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.

The proposal is recognized by the Code as a use that is compatible with other uses in the Agricultural District, provided certain requirements can be met and absent evidence rebutting the presumption of compatibility.

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- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.

There are churches and schools in the overall community but no such structures or uses are located within the immediate vicinity of the proposed use.

- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.

The proposed use is a legislatively recognized use that is presumptively compatible with and can co-exist with other uses permitted in the Agricultural District.

- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreational and open space.

No impact in these areas results from approval of the proposed use.

- (10) The preservation of cultural and historic landmarks.

Not applicable to the request.

The Hearing Examiner finds that the Applicant can meet or exceed each and every specific statutory requirement of the Harford County Code. In addition to specific statutory requirements, Maryland Courts have had occasion to discuss the burden of proof that must be met by an applicant in a special exception case.

Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

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The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”).

The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” See Schultz at 432 A. 2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).

The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).

In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).

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In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.” (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

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In the instant case, there was no evidence presented that the proposed use would have an adverse impact at this location greater than or different than if the use were conducted elsewhere in the zone. Based upon the foregoing analysis, the Hearing Examiner recommends approval of the request subject to the following conditions:

1. A Site Plan shall be prepared and submitted for review and approval through the Development Advisory Committee (DAC).
2. The Applicants shall obtain all necessary permits and inspections for the existing building.
3. The Applicants shall store all material and equipment needed in their business within the pole building or within a fully screened outside storage area.
4. No major repairs to vehicles shall be performed on site. General maintenance shall be allowed to personal and business use vehicles.
5. Hours of operation shall be limited to 6:00 a.m. until 8:00 p.m. weekdays and 6:00 a.m. until 6:00 p.m. on Saturdays. No operations will be allowed on Sunday or at other times except in emergencies.
6. Applicant shall submit a landscaping plan for the review and approval of the Department of Planning and Zoning that is in general conformance with the landscaping proposed by the Applicants' expert landscaper and nurseryman. This will include, at a minimum, 19 conifer and evergreen trees of 8 foot minimum height to be strategically located to maximize screening of the outside storage areas from adjacent properties. Applicant shall maintain the trees in a healthy, prospering manner and shall replace any trees that die. The Department of Planning and Zoning may require additional trees be planted in order to maximize the screening provided.
7. Lighting shall be of a type that does not shine on adjacent properties but is directed downward. Lighting shall be set to timers that shut the lighting off at 10:30 p.m. until one-half hour before business operations commence in the morning.

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8. This approval is for the use of the Applicants only and may not be transferred or sold.

Date SEPTEMBER 2, 2003

**William F. Casey
Zoning Hearing Examiner**